

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission
On Its Own Motion

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Docket No. 08-0312

Review of the Original Cost Audit of
Commonwealth Edison Company

**REPLY BRIEF OF THE
STAFF OF THE ILLINOIS COMMERCE COMMISSION**

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Table of Contents

	<u>Page</u>
I. INTRODUCTION	1
II. ARGUMENT	3
A. Response to the AG	3
B. Response to ComEd	5
III. CONCLUSION.....	9

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Staff of the Illinois Commerce Commission (“Staff”), by and through its counsel, pursuant to Section 200.800 of the Rules of Practice (83 Ill. Adm. Code 200.800) of the Illinois Commerce Commission’s (“Commission”), respectfully submits its Reply Brief in the above-captioned matter regarding the Commission’s review of the Original Cost Audit (“OCA”) of Commonwealth Edison Company’s (“ComEd”) delivery system plant in service balance as of December 31, 2004.

I. INTRODUCTION

The Initial Brief of the Staff of the Illinois Commerce Commission (“Staff’s Initial Brief” or “Staff IB”) was served on September 10, 2009. The Initial Brief of The People of The State of Illinois (“AG’s Initial Brief” or “AG IB”) and the Initial Brief of ComEd (“ComEd IB” or “ComEd’s Initial Brief”) were also filed or served on September 10, 2009. ComEd also filed a draft proposed order with its Initial Brief. As set forth in

Staff's Initial Brief, Staff recommends that the Commission make a finding regarding the original cost of ComEd's plant in service at December 31, 2004. Staff witness Struck recommended the Commission find that the original cost of ComEd's plant in service at December 31, 2004 was \$11,349,394,000 as set forth on line 9 of his Schedule 1.1. ICC Staff Exhibit 1.0, p. 3. Mr. Struck explained that his Schedule 1 begins with the unadjusted balance of plant in service at December 31, 2004 and applies to that balance the adjustments the Commission made to ComEd's pre-2005 historical plant in service in ComEd's two most recent rate cases, Docket Nos. 05-0597 and 07-0566. Staff IB, p. 4. ComEd in its Initial Brief agreed with Mr. Struck's figure of \$11,394,000. ComEd IB, pp. 2 and 16.

Some of the issues raised in the AG's Initial Brief were addressed in Staff's Initial Brief and, in the interest of avoiding unnecessary duplication, Staff has not repeated every argument or response previously made in Staff's Initial Brief. Thus, the omission of a response to an argument that Staff previously addressed simply means that Staff stands on the position taken in Staff's Initial Brief. To the extent that ComEd raises an argument in its Initial Brief or draft proposed order, the absence of a response by Staff to the argument should not be construed that Staff agrees with the argument made by ComEd. Staff is only addressing certain arguments raised by ComEd, which are related to the stated purpose of this proceeding which is to make a finding regarding the original cost of ComEd's plant in service at December 31, 2004.

II. ARGUMENT

A. Response to the AG

According to the AG the issue in this docket is simple: Have ratepayers been over charged in the past and are ratepayers entitled to a refund for the amount they have been overcharged. The AG is recommending that the Commission order ComEd to refund to customers over \$26.225 million (with an additional \$1.425 million per month until a final order is issued in this matter. AG Exhibit 2.0, p. 9. Lines 196-199.) for alleged over payments for the period that the rates approved in dockets 05-0597 and 07-0566 were or have been in effect. AG IB, p. 3. The answer to the AG's question is also simple - No. Ratepayers have not been overcharged; and there should be no refund to ratepayers. As will be explained later on in this brief, if the Commission were to order ComEd to refund money back to customers such an order would violate the rule against retroactive-ratemaking.

Staff disagrees with the AG's position that ratepayers have been overcharged in the past. As Staff set forth in its Initial Brief, Mr. Effron calculated the effect of the accounting change on the Company's revenue requirements from Docket Nos. 05-0597 and 07-0566 because Mr. Effron believes that ComEd has already recovered the cable fault costs during the 2002-2006 period. Staff's position is that Mr. Effron's assumption views the effect of ComEd's change in its accounting policy in isolation from the other components of the revenue requirement. ICC Staff Exhibit 2.0, pp. 2-3. Staff witness Struck explained in his testimony that:

in between rate cases, utilities recover their costs in the aggregate, whatever their composition, rather than line item by line item. Mr. Effron's double recovery argument considers the cable fault expenditures as a single line item rather than in the aggregate with other costs incurred during the 2002-2006 time period. Mr. Effron is correct that in 2002

ComEd began treating as an asset cable fault repair expenditures it previously treated as an expense. However; it does not automatically follow that the change in this item, in and of itself, caused ComEd to recover more than it should in the aggregate during 2002-2006 so as to enable future double recovery as Mr. Effron asserts.

Id., p. 3 For this reason Staff recommends that the Commission reject AG witness Effron's argument. Staff IB, p. 6.

With regard to the issue of whether the Commission should order a refund back to customers under the assumption that there was an overcharge, the AG's position would violate the rule against retroactive-ratemaking. The relevant case on this issue is the Illinois Supreme Court's decision in Citizens Utilities Co. of Illinois v. Ill. Commerce Comm'n, 124 Ill. 2d 195 (1988). ComEd addressed Citizens in its Initial Brief. Staff agrees with certain arguments made by ComEd with respect to the Citizens case as well as the impact of Citizens on the instant docket, but as explained below does not endorse certain statements by ComEd on the law that are not relevant to the instant proceeding. The rule against retroactive-ratemaking prohibits refunds when rates are too high, and surcharges when rates are too low. *Id.*, at 207. In Citizens, the Commission ordered a reduction to rate base which represented 25 years worth of the utility claiming a tax expense for ratemaking purposes that was greater than taxes actually paid by the utility. *Id.*, at 202. The Supreme Court found that the reduction to rate base denied retroactively tax benefits that the Commission had previously permitted the Company to enjoy for 25 years. The court found that action to conflict with fundamental ratemaking in Illinois and to be a violation against the rule against retroactive-ratemaking. *Id.*, at 207. While it may not have been clear from Mr. Effron's testimony, it certainly is clear from the AG's Initial Brief that the AG believes rates were too high for the period when the rates approved in 05-0597 were in effect and are still

too high for the period that the rates approved in 07-0566 have been in effect (April 1, 2002 to present). The AG wants those overcharges to be refunded back to customers. AG IB, p. 13. It is hard to imagine a more blatant violation of the rule against retroactive-ratemaking.

Based upon the above and the arguments previously made by Staff in its Initial Brief, the AG's arguments should be rejected.

B. Response to ComEd

Staff and ComEd are in agreement on several important issues in this proceeding. First and most important, Staff and ComEd are in agreement that the Commission should find that the original cost of ComEd's delivery system plant in service balance as of December 31, 2004 is \$11,349,394,000. ComEd IB, p. 16; Staff IB, p. 4. Second, Staff and ComEd are in agreement that there has not been an overcharge/double recovery due to ComEd's change in Accounting policy. ComEd IB, pp. 13-14; Staff IB, p. 6. Third, Staff and ComEd are in agreement that there is no current Commission rule or Commission policy which requires changes in accounting policy to be synchronized with rate orders. ComEd IB, pp. 10-11; Staff IB, pp. 5-6. However, Staff is not in agreement with ComEd's interpretation of certain court decisions cited in its Initial Brief, and Staff disagree with certain language in ComEd's draft proposed order.

Staff does not agree with ComEd's interpretation of Quantum Pipeline Co. v. Illinois Commerce Comm'n, and to a certain extent ComEd's apparent interpretation of Citizens Utilities Co. of Ill. V Ill. Commerce Comm'n. See ComEd IB, pp. 6-9. Staff will

first address the Citizens case. It is not clear to Staff what ComEd intended when it stated in its Initial Brief “[f]or the same reason, the Commission may not now ‘adjust’ ComEd’s rates (through) a rate base disallowance), even rates to be collected only prospectively, by reversing an allowance that it had previously incorporated in its rate orders.” ComEd IB, pp. 8-9. If by that statement ComEd means that rate base cannot be adjusted in a way that refunds money back to ratepayers for rates that were too high for a period of time in the past, Staff agrees. However, if ComEd means that the Commission cannot change its handling of an issue on a going forward basis like the court in Citizens found acceptable with respect to tax depreciation expense for the 1983 test year for Citizens (Citizens, at 215-216), then Staff disagrees. If ComEd’s position is that the Commission is forever locked into its prior handling of an issue, then Staff disagrees. ComEd’s apparent position would turn Commission proceedings into nothing more than a game of Gotcha. Staff’s position is consistent with the Citizens case. The court in Citizens found nothing wrong with the Commission changing its view on an issue on a going forward basis. Id. Moreover, the issue that ComEd addresses (prospective changes) is not present in the instant proceeding, and need not be addressed in this docket.

With respect to the Quantum case, that case is distinguishable on its facts. Quantum is a notice case. Quantum involved the Commission rescinding a previously granted certificate of public convenience and necessity to a pipeline transportation company. The court in Quantum found that because the rescission of a certificate of public convenience and necessity may affect substantial rights of a party, the party was

entitled to certain due process rights. No certificate of public convenience and necessity is at issue in this proceeding, accordingly Quantum is not relevant here.

While Staff does not agree with ComEd's interpretation and application of the Quantum case to this proceeding and may have a disagreement regarding ComEd's interpretation of Citizens, the Commission need not come to a conclusion on these issues given that both Staff and ComEd are in agreement that Mr. Effron's proposed adjustment should be rejected as retroactive ratemaking. Accordingly, the Commission's order in its analysis and conclusion section need not consider the impact of these two opinions. The order need only state the following:

For the reasons enumerated above, the Commission agrees with Staff and ComEd and finds that the original cost of ComEd's delivery system plant in service as of December 31, 2004 is \$11,349,394,000. The AG's position that ratepayers have been over charged is rejected. A single element of a revenue requirement should not be viewed in isolation as a matter of ratemaking policy. All the elements of a revenue requirement should be viewed in the aggregate so that changes in one element are netted against changes in all other elements. While Mr. Effron is correct that in 2002 ComEd began treating as an asset cable fault repair expenditures it previously treated as an expense, it does not automatically follow that the change in this item, in and of itself, caused ComEd to recover more than it should in the aggregate during 2002-2006 so as to enable future double recovery.

Staff has one final comment on ComEd's draft proposed order. ComEd in its draft proposed order summarizes Staff's position. For the most part the summary is accurate, except the draft proposed order in the second paragraph states in part that:

Staff argues that Mr. Effron does not challenge ComEd's change in accounting policy, only its timing, incorrectly concluding that this results in a double recovery. Staff argues that this is contrary to Bus. and Prof'l People for the Public Interest, et al., v. Ill. Commerce Comm'n, et al., 146 Ill. 2d 175 (Ill. 1991), and states that it has never been the practice to examine each of the utility's individual actual post-test year costs to

determine if a utility is spending more or less than the costs reflected in rates. ...

ComEd Proposed Order, p. 4. A more accurate and precise summary of Mr. Struck's testimony would be the following:

Staff argues that Mr. Effron does not challenge ComEd's change in accounting policy, only its timing, incorrectly concluding that this results in a double recovery. Staff disagrees with Mr. Effron's attempt to view ComEd's change in accounting policy in isolation from other components of the revenue requirement. A single element of a revenue requirement should not be viewed in isolation as a matter or ratemaking policy. All the elements of a revenue requirement should be viewed in the aggregate so that changes in one element are netted against changes in all other elements. That position is consistent with Bus. and Prof'l People for the Public Interest, et al., v. Ill. Commerce Comm'n, et al., 146 Ill. 2d 175 (Ill. 1991),

Staff would note that the first and third paragraphs of ComEd's draft order are acceptable to Staff. Accordingly, to the extent that Staff's position is summarized in the Commission's final order, Staff's summary above for the 2nd paragraph should be used along with the first and third paragraphs from ComEd's draft proposed order.

III. CONCLUSION

Staff respectfully requests that the Illinois Commerce Commission approve Staff's recommendations in this docket.

Respectfully submitted,

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